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*Anger*  
*P.L. 42*

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

FILE: B-189790

DATE: February 22, 1978

MATTER OF: Nuclear Research Corporation

**DIGEST:**

1. General allegation that agency violated ASPR § 101-507.2 (1976 ed.) by improperly disclosing protester's technical and pricing information to protester's named supplier, during preaward survey of supplier, lacks specificity necessary to establish occurrence of violation where agency categorically denies any disclosure.
2. 4 C.F.R. § 20.2(b)(1) (1977) requires that protest allegations founded upon improprieties apparent on the face of the solicitation be filed prior to the closing date for receipt of initial proposals or prior to the next closing date for receipt of proposals following the incorporation of an alleged impropriety. Protest of such allegations filed after closing date for best and final offers is not for consideration.

Nuclear Research Corporation (NRC) protests the award of a contract to Rexnord Instrument Products, Inc. (Rexnord) for 69 dissolved oxygen measurement systems (DOMS) under request for proposals (RFP) No. N00140-77-0453 issued by the Naval Regional Procurement Office, Philadelphia, Pennsylvania (Navy). NRC's protest centers on its conviction that the Navy has consistently accorded its competitor, Rexnord, an unfair advantage in the course of both this procurement and previous DOMS procurements. NRC believes that the favored treatment is the result of years of close technical liaison between the Navy and Rexnord and its predecessor company during which time a DOMS capable of meeting the Navy's requirement was developed.

We will briefly review the background of this procurement and its two predecessors before examining NRC's specific allegations.

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NRC's submissions have emphasized that this is the third protest against an award of a DOMS procurement to Rexnord. The first protest, B-184401, and the second protest, B-186589, were filed by one of NRC's proposed suppliers under the instant solicitation, Delta Scientific Corporation (Delta). The first protest concerned the Navy's sole-source procurement of 61 DOMS. Delta protested, first, the sole-source nature of the procurement and, second, the Navy's refusal to consider Delta's late proposal for award. Although we found Delta's protest of the sole-source procurement to be untimely, we did conclude that an agency contemplating a sole-source procurement could properly consider for award a late proposal submitted by a firm other than the sole-source specified in the solicitation where the item offered was capable of evaluation and delivery within the time constraints of the procurement. Notwithstanding this conclusion we denied Delta's protest because the item which Delta had offered in its late proposal was not susceptible to the requisite evaluation. Delta Scientific Corporation, B-184401, August 3, 1976, 76-2 CPD 113. Delta's second protest (B-186589) was of the Navy's competitive solicitation for an additional 117 DOMS. Delta withdrew the second protest following the Navy's amendment of the protested solicitation.

The Navy's chief technical concern in the present procurement focuses on whether the successful offeror will be capable of fabricating a device which can meet the following solicitation requirement:

"3.15.3.1 Oxygen Measurement Cell - Dissolved oxygen detection shall be accomplished by a galvanic (self-polarizing) consisting of a noble metal cathode, anode and electrolyte. Water samples flowing past the cell shall be prevented from contacting the cell electrodes by a replaceable plastic membrane shield which shall allow oxygen gas permeation sufficient for the cell operation but exclude other materials in the sample that might damage, disrupt or otherwise affect, the oxygen current generation mechanism of the electro-chemical cell."

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Such a device, also referred to as a galvanic oxygen probe (probe), was previously supplied by Rexnord. Rexnord claims that it holds at least two U.S. patents on its version of the probe.

The Navy structured the present RFP so as to permit the submission of alternate proposals on the basis of a possible waiver of first article testing. An offeror could propose on the basis of Lot I (with testing) or Lot II (without testing) or both. Rexnord, due to its position as the only previous supplier of DOMS, was in a position to offer on Lot II alone. The solicitation stated that the Government would provide such testing as might be required and that the cost to the Government of such tests would be a factor in the evaluation of the Lot I proposals. The Government estimated that the testing would cost \$40,000.00 and so advised potential offerors in the solicitation. Only two offers were received in response to the solicitation. NRC offered on the basis of Lot I (with testing) while Rexnord offered on the basis of Lot II (without testing). At this stage of the procurement NRC was the low evaluated offeror at \$255,506.00 with Rexnord second low at \$266,490.76. The Navy reports that it contemplated an award to NRC on the basis of initial proposals, pursuant to Armed Services Procurement Regulation (ASPR) § 3-805.1 (1976 ed.). On March 17, 1977 the procuring activity requested a preaward survey of NRC. The survey, dated April 8, 1977, recommended an award to NRC.

The survey disclosed that Delta would furnish NRC the probe assembly which NRC would install in the DOMS. The preaward survey team concluded that NRC had the technical ability to perform the contract. At about this time, NRC contacted Rexnord and made inquiries regarding the purchase of Rexnord's patented probes. Rexnord thereupon advised the Navy by letter of April 13, 1977, of the NRC inquiry. Rexnord's letter to the Navy also raised the possibility of patent infringement by NRC if it attempted to provide a probe which met the specifications. On April 21, 1977 the Navy directed a re-survey of NRC and a secondary survey of Delta with a special emphasis on whether NRC and Delta had the requisite resources to furnish a probe which was technically capable of meeting the specification.

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NRC alleges that during the course of the second survey on May 9, 1977 at Delta, Navy personnel discussed NRC's proposal and pricing with Delta officials. NRC further alleges that a Delta employee, who was both aware of NRC's pricing and who was present during the second survey, resigned his position at Delta soon after the survey to become Rexnord's Field Sales Manager. On June 2, 1977 it was once again recommended that an award be made to NRC. The survey did note, however, the close similarity between the probe NRC intended to use and the patented Rexnord probe. This information raised the possibility of potential Government liability for payment of a reasonable royalty to Rexnord under 28 U.S.C. 1498 (1970). On June 7, 1977 Rexnord sent the Navy copies of its patents. On June 15, 1977 the contracting officer amended the solicitation to include the "Patent Indemnity" clause set forth at ASPR § 7-104.5 (1976 ed.). The Lot II delivery schedule was also adjusted. The letter of amendment requested best and final offers from both offerors. NRC did not object to the amendment and on June 29, 1977, submitted its best and final offer. Rexnord also submitted a best and final offer and in so doing reduced its prices. Rexnord's price reduction displaced NRC from its previous position as the low evaluated offeror.

Our examination of the specific allegations which NRC has presented for our consideration convinces us that all but one are untimely raised. Further, it is not altogether clear that the remaining allegation is timely. However, we believe there is sufficient doubt as to whether it is untimely to merit its discussion.

NRC alleges that the Navy violated the provisions of ASPR § 3-507.2(a) (1976 ed.) and § 3-507.2(b) (1976 ed.) by improperly disclosing technical and pricing aspects of NRC's proposal to Delta. ASPR § 3-507.2(a) (1976 ed.) generally prohibits the release, to the public or to anyone within the Government not having a legitimate interest therein, of any information contained in any proposal prior to acceptance of the winning offer, while ASPR § 3-507.2(b) (1976 ed.) reads in part as follows:

"(b) Equal Consideration and Information to All Prospective Contractors. Discussions with prospective contractors regarding a potential procurement and the transmission of technical or other information shall be conducted only by the contracting officer, his superiors having contractual authority or others specifically authorized. Such personnel shall not furnish any information to a potential supplier which alone or together with other information may afford him an advantage over others."

NRC's improper disclosure argument centers upon NRC's speculation concerning the behavior of the previously mentioned Delta employee who might have had access to certain technical and pricing information contained in NRC's proposal as a result of his employment with Delta. The Navy categorically denies any improper disclosure of NRC's pricing and technical information either at the May 9, 1977 meeting or at any other time. In support of its position the Navy has submitted a September 13, 1977 letter from Rexnord which states that Rexnord did not receive any NRC information from anyone within the Navy's technical or contract groups. The letter further states that the newly hired Manager of Field Sales did not bring "any new knowledge" of the NRC offering and that he was not present at the meeting with the Navy. Finally the Defense Logistics Agency has advised the Navy that the DCAS personnel who participated in the May 9, 1977 survey of Delta did not discuss either cost or price with personnel of either NRC or Delta. In view of the above and considering NRC's lack of specificity as to the exact nature of the alleged disclosure of information, we cannot conclude that Navy personnel were at any time in violation of ASPR § 3-507.2 (1976 ed.).

In any event, as we have noted, this allegation is partially untimely. The gist of the allegation is that the Government, through Delta, disclosed technical and price information contained in NRC's proposal to Rexnord. NRC claims to have become aware of the alleged technical information disclosure on June 16, 1977 when it received a letter from Rexnord's patent attorney. NRC takes the position that such information could only have come from the Government. If this is the case, NRC should have protested the disclosure of its technical information within ten days

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of its receipt of the Rexnord letter. 4 C.F.R. § 20.2 (b) (2) (1977). The record is unclear as to the exact date when NRC knew that Rexnord might have come into possession of NRC's pricing information and for this reason we have considered NRC's allegation which we find to be without merit. As the Navy has pointed out, the mere fact that the successful offeror reduces its price in the course of making its best and final offer is an insufficient basis upon which to base a conclusion that the protester's pricing information has been leaked. Hydrosystems, Inc., B-184176, November 28, 1975, 75-2 CPD 358. Even if it were leaked in the manner which NRC alleges we believe that such a problem is for resolution among NRC, Delta, and the former Delta employee.

NRC's three remaining allegations: that the Navy improperly amended the solicitation; that the Navy's estimated cost of first article testing was unreasonably high; and that the chosen method of procurement is improper are all of such a nature as to require, under 4 C.F.R. § 20.2(b)(1) (1977), either that they be protested prior to the closing date for receipt of initial proposals (estimated cost of testing and method of procurement) or prior to the date set for best and final offers (amendment of the solicitation). The closing date for receipt of initial proposals was March 14, 1977, while the deadline for best and final offers was June 29, 1977. NRC's protest was not filed until July 29, 1977 and for this reason the balance of its allegations are not for consideration on the merits.

We note however that ASPR § 9-103 (1976 ed.) authorizes use of the patent indemnification clause:

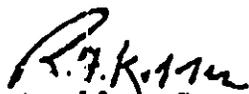
"In order that the Government may be reimbursed for liability for patent infringement arising out of or resulting from the performance of \* \* \* contracts for supplies which are or have been sold or offered for sale to the public in the commercial open market or which are the same as such supplies with a relatively minor modification thereof \* \* \*."

Moreover we have held that where the Government's inclusion by amendment of a royalties clause in a solicitation would impose additional requirements on the

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contractor the offerors would be free to disregard such additional requirements were they not afforded an opportunity to consent thereto. 51 Comp. Gen. 411, 413 (1972). We therefore see no ground for questioning the Navy's second call for best and final offers.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States